No. 17-368

In The Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CENTER FOR BIOLOGICAL DIVERSITY, FOOD & WATER WATCH, FRIENDS OF THE EARTH, GREENPEACE, INC., INSTITUTE FOR LOCAL SELF-RELIANCE, AND NC WARN, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

HOWARD M. CRYSTAL
Counsel of Record
ANCHUN JEAN SU
CENTER FOR BIOLOGICAL DIVERSITY
1411 K Street, N.W., Suite 1300
Washington, DC 20005
(202) 849-8397
hcrystal@biologicaldiversity.org

Counsel for Amici Curiae

February 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTERESTS OF *AMICI CURIAE*

Amici – as further described in the Addendum – are leading advocacy organizations working toward a just energy transition, from a fossil fuel-based economy to a renewable energy system, in order to combat climate change and protect the health of communities and the planet. Because the rapid expansion of distributed solar generation is central to this effort, *Amici* are concerned with public power companies like the Salt River Project Agricultural Improvement and Power District ("SRP") exercising monopoly power to discourage consumer adoption of distributed solar systems.[1]

In light of both ever-increasing greenhouse gas concentrations – currently at more than 400 parts-per-million – and the negative impacts of fossil fuel extraction and combustion on public health, wildlife, and the environment, public power companies like SRP should not be permitted to stifle rooftop solar competition in violation of the Sherman Act, which is contrary to the public interest premise on which they were granted monopoly power. Rather, in *Amici's* view, the *Parker v. Brown* state-action defense, 317 U.S. 341 (1943), and interlocutory appeal of *Parker* defense rulings, should not be available as a legal bulwark from antitrust laws for public power companies like SRP to

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief.

discourage captive ratepayers from accessing renewable energy choices.

SUMMARY OF ARGUMENT

The Ninth Circuit correctly concluded that SRP may not invoke the collateral-order doctrine. SRP's *Parker* defense raises factual issues closely tied to the merits, and SRP should not be shielded from antitrust liability for imposing electricity rates that improperly target distributed solar customers and are contrary to the public interest.

1. Because SRP is an "essentially business enterprise[ ]," *Ball v. James*, 451 U.S. 355, 368 (1981), its *Parker* defense cannot succeed unless SRP can demonstrate active state supervision. Since that inquiry turns on "all the circumstances of a case," *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1117 (2015) ("*N.C. Dental*"), it is not completely separate from the merits, and thus not eligible for interlocutory appeal.

2. Arizona has numerous affirmative state policies designed to expand rooftop solar development as a vital component of its clean energy transition. Resolving whether SRP's discriminatory rates are contrary to these state objectives is also closely tied to the merits of SolarCity's antitrust claims.

3. While regulated electricity monopolies were originally created to protect the public interest,

changes in public policy and technology undermine the premise that this model necessarily serves public objectives today. Instead, SRP and other power companies have asserted monopoly power to impose discriminatory rates on distributed solar customers that ultimately harm consumers and the environment, contravening the original purpose of the regulated monopoly. Accordingly, neither the *Parker* defense nor collateral appeal of adverse *Parker* defense rulings should be available for public power entities like SRP to obstruct distributed solar development in violation of antitrust laws.

ARGUMENT

I. SRP IS NOT ENTITLED TO AN INTERLOCUTORY APPEAL BECAUSE ITS STATE-ACTION DEFENSE REQUIRES RESOLUTION OF FACTUAL ISSUES CLOSELY TIED TO THE MERITS

As this Court has emphasized, the federal antitrust laws are a "central safeguard" prohibiting "practices that undermine the free market." *N.C. Dental*, 135 S. Ct. at 1109. Thus, while states themselves may "limit competition to achieve public objectives," *id.*, a reviewing court must closely examine whether an entity created by a state should be entitled to the same freedom. *Id.* at 1111-17. As this case demonstrates, however, that analysis requires resolving both whether the state has exercised sufficient supervision, and whether the particular action being challenged aligns

with the state's policy objectives. These fact-driven determinations are not suitable for collateral appeal.

A. Because SRP Must Demonstrate Active Supervision, Its State-Action Defense Requires The Resolution Of Facts Closely Tied To The Merits

The collateral-order doctrine may not be invoked where disputed questions of fact must be resolved before the issue on appeal can be conclusively resolved. *Ortiz v. Jordan*, 562 U.S. 180, 190-91 (2011); *Johnson v. Jones*, 515 U.S. 304, 314 (1995). This limitation alone is fatal to SRP's appeal, because SRP concedes that the active supervision component of the *Parker* defense may turn on disputed facts. Pet. Br. at 22-23 (noting that the *Parker* defense may turn "on factual grounds, such as where state officials did not exercise their power to supervise the defendant").

SRP seeks to avoid this conundrum by claiming it is not subject to this requirement, and that its appeal therefore falls within a "class of orders" "denying state-action immunity on legal grounds." Pet. Br. at 23-24; *see also id.* at 2 n.1 (citing *Town of Hallie v. Eau Claire*, 471 U.S. 34 (1985)). But SRP does not possess the qualities necessary to be freed from the active state supervision requirement.

As SRP recognizes, the *Hallie* exception to the active supervision requirement applies to municipal governments because they are subject to the electoral accountability necessary to ensure they serve the

public interest as authorized by the state. Pet. Br. at 2 n.1; *Hallie*, 471 U.S. at 46. SRP, however, while labelled a "public power entity," is in actuality an unregulated business monopolist.[2]

This Court's decision in *Ball v. James*, 451 U.S. 355 (1981), makes this absolutely clear. There, the Court considered a constitutional challenge to the eligibility rules for SRP elections, whereby only certain landowners have the right to vote at all (thus eliminating the voting rights of approximately one-third of its electricity customers), and the more property one owns, the more heavily weighted one's vote (thus favoring large landowners). *Id.* at 359.

Relying on SRP's essentially private character, the Court found SRP exempt from the one-person, one-vote principle, explaining that water districts like SRP are "essentially *business enterprises*, created by and chiefly benefiting a specific group of landowners," *id.* at 368

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[2] The fact that, as SRP stresses, the Arizona Constitution purports to endow it with the "immunities and exemptions granted municipalities," Pet. Br. at 5, is of no moment. This Court has made clear that a state may not immunize a sub-state entity from the Sherman Act by simply "authorizing them to violate it, or by declaring that their action is lawful." *N.C. Dental*, 135 S. Ct. at 1111 (quoting *Parker*, 317 U.S. at 351). Similarly, the Court has explained that, contrary to the argument of the *Amici* National Governors Association, et al. (collectively, "NGA"), Nat'l Governors Ass'n et al. Amicus Brief at 7 n.3 ("NGA Br."), the fact that a state could correct a public power entity's decision is also not an adequate substitute for direct supervision. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) ("The mere potential for state supervision is not an adequate substitute for a decision by the State.").

(emphasis added), and thus do "not exercise the crucial powers of sovereignty typical of a general purpose unit of government such as a state, county, or municipality." *Id.* at 372 (Powell, J., concurring); *id.* at 366 (explaining SRP does not "administer such normal functions of government as the maintenance of schools, or sanitation, health or welfare service"). Moreover, as regards electricity sales in particular, the Court noted that the "sale of electric power" by SRP is "not for the primary purpose of providing electricity to the public," but rather that SRP uses electricity sales "to defray the expense in irrigating these private lands for personal profit." *Id.* at 368-69 and n.17; *see also Niedner v. Salt River Project Agric. Improvement & Power Dist.*, 121 Ariz. 331 (1979) (rejecting due process claim against SRP on the grounds that it is "a business corporation with attributes of sovereignty which are only incidental, conferred for the purposes of better enabling it to function and accomplish the business and economic purposes for which it was organized").

In short, rather than being "democratically governed" and "directly accountable to the public," as foundational to the majority of public power entities, American Public Power Association et al. Amicus Brief at 9 ("APPA Br."), SRP's structure inherently favors the private interests of large landowners at the expense of the broad base of its electricity consumers, who lack any meaningful accountability mechanism over SRP's decisions. Accordingly, to succeed with a *Parker* defense, SRP must demonstrate it is subject to

active supervision by the State. *See N.C. Dental*, 135 S. Ct. at 1111-12.

SolarCity's antitrust claims here are thus entirely distinguishable from the challenges to public utility districts on which *Amici* American Public Power Association and Large Public Power Council (collectively, "APPA") rely. APPA Br. at 5 (citing *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833, 838 (9th Cir. 1985) (concerning Sacramento's utility); *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 401-02 (9th Cir. 1992) (discussing defense available for utilities on the grounds that "they are usually intensively regulated")). As in *Hallie*, those challenges involved the liability of municipal governments and the power entities they created, entities whose profits were "re-directed to their authorizing governmental units, or to their customers." APPA Br. at 17. This is a far cry from an "essentially business" entity like SRP. *Ball*, 451 U.S. at 368. And it is precisely because of the "risk of self-dealing," *N.C. Dental*, 135 S. Ct. at 1114, that SRP must be subject to active supervision, even while these other traditional public utility entities are not. *Compare* APPA Br. at 9 (discussing how public power companies are "democratically governed" for the purpose of "'expos[ing] decision makers to greater popular pressure'" and making them "'more accountable generally to serve to reduce [electricity] prices'") (quoting John E. Kwoka, Jr., *Governance Alternatives & Pricing in the U.S. Electric Power Industry*, 18 J.L. Econ. & Org. 278, 293 (2002)) *with* Robert Anglen, *SRP Spends Millions on Executive Education Perks*, USA Today (Feb. 6,

2015), *available at* https://www.usatoday.com/story/money/business/2015/02/06/srp-spends-millions-executive-education-perks/22964871/ (discussing SRP's multi-million dollar tuition reimbursement perk for children of SRP executives); *see also, e.g.*, Joint Appendix ("J.A.") at 15-17 (¶¶ 35-38) (discussing $1.6 million SRP paid for sponsorship of major sports teams and other "events and entertainment," and Standard and Poor's praise for SRP's "commitment to strong financial margins").

As for the similar arguments of NGA, this case also does not concern an entity charged with "promoting consumer welfare and [] subject to democratic self-correction by their electorates," NGA Br. at 17, since the SRP electorate is limited to landowners, and weighted to the largest landowners. *Ball*, 451 U.S. at 359. As such, resolving whether the state-action defense applies to SRP also does not implicate these sovereign concerns or legitimate interests. *See also Mesa v. Salt River Project Agric. Improvement & Power Dist.*, 373 P.2d 722, 731 (Ariz. 1961) ("In conducting its ordinary business [SRP] is not exercising governmental or political prerogatives as it is not operated for the direct benefit of the general public. . . .").

In sum, because there is no basis either to consider SRP's decisions as "sovereign actions," *see* State of Tennessee, et al. Amicus Brief at 16, or to assume that SRP is "carrying out a state's economic policies," Pet. Br. at 34, SRP's effort to be freed from the active state supervision requirement must fail. And since resolving whether SRP has been adequately supervised turns on

the resolution of factual issues closely tied to the merits of SolarCity's antitrust claims, SRP's *Parker* defense is thus not eligible for collateral appeal. *Cf. Cost Management Svcs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 943 (9th Cir. 1996) ("the question of whether a state has 'actively supervised' a state regulatory policy is a factual one which is inappropriately resolved in the context of a motion to dismiss").

In addition, because SRP is an active market participant in the sale of electricity, a reviewing court will need to pay particularly close attention to whether the State – here Arizona – is exercising the requisite active supervision to entitle SRP to invoke the state-action defense. *See N.C. Dental*, 135 S. Ct. at 1111 ("[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern"); *FTC v. Ticor*, 504 U.S. at 634 ("where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State") (citations omitted). Viewing SRP in this light, it is also clear that neither the "efficiency of government and the initiative of its officials," nor any other "particular value of a high order," *Will v. Haddock*, 546 U.S. 345, 352-53 (2006), would be implicated by permitting SolarCity's antitrust claims to proceed before SRP may obtain appellate review concerning its state-action

defense – yet another basis on which to conclude that the collateral-order doctrine is not available.[3]

B. In Light Of The Many Arizona Policies Supporting The Expansion Of Rooftop Solar Development, SRP's Claimed Authorization For Its Discriminatory Rates Is Also Closely Tied To The Merits

In order for public power entities to invoke the *Parker* defense against liability claims, they must demonstrate they are acting "pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 217 (2013) (quoting *Community Comms. Co. v. Boulder*, 455 U.S. 40, 52 (1982)). SRP claims that Arizona's delegation of rate-making power is the only expression of state policy relevant to this inquiry. Pet. Br. at 20. However, the State also has numerous affirmative policies promoting self-generated, renewable electricity – demonstrating that, in fact,

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[3] SRP repeatedly asserts its appeal raises purely legal issues because a reviewing court assumes the truth of the allegations in SolarCity's complaint. *E.g.*, Pet. Br. at 3. If that alone were sufficient, however, public officials would always be entitled to immediately appeal rulings made on motions to dismiss or for summary judgment – an approach this Court has explicitly rejected. *See, e.g.*, *Will*, 546 U.S. at 353 (rejecting the proposition that collateral appeal is "a matter of right whenever the Government los[es] a motion to dismiss. . . ."); *Jones*, 515 U.S. 304 (summary judgment ruling against officials not immediately appealable).

Arizona has no clearly articulated policy supporting SRP's anti-competitive practices at issue here.[4]

"[T]he Arizona legislature's enactment of laws encouraging the use of solar energy dates back to at least 1974." *Garden Lakes Cmty. Ass'n v. Madigan*, 204 Ariz. 238, 241 (Ariz. Ct. App. 2003). Like many other states, Arizona requires utilities to procure solar generation as part of a Renewable Energy Standard ("RES" or otherwise commonly called Renewable Portfolio Standard ("RPS")). *See* Ariz. Admin. Code § R14-2-703 (2017). Under this program utilities obtain renewable energy credits ("RECs"), including credits from home solar systems, *id.* § R14-2-1801 (2017), et seq. *See Allco Fin., Ltd. v. Klee*, 861 F.3d 82, 92-94 (2d Cir. 2017) (describing how RPS and REC programs generally work); *see also* N.C. Clean Energy Tech. Ctr., *Find Policies & Incentives by State*, *available at* http://www.dsireusa.org/ (showing that almost thirty states have mandatory RPS or other renewable electricity standards); National Conference of State Legislatures, *State Policies for Power Purchase Agreements*,

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[4] These underlying Arizona state policies – which are highly relevant to whether SRP has the "authorization" necessary to be free from antitrust liability – serve to highlight why this case would be a particularly poor vehicle to find that public entities are always entitled to immediately appeal adverse state-action defense rulings. And since the collateral-order doctrine's applicability does not turn on the facts of a particular case, the Court might on this basis conclude that *certiorari* was improvidently granted. *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994).

available at http://www.ncsl.org/research/energy/state-policies-for-purchase-agreements.aspx (reviewing states that authorize third party power purchase agreements to further foster rooftop solar development).

The Arizona legislature has also adopted tax incentives to encourage solar installation, including: (i) the Solar Energy Credit program, which allows a tax deduction of up to $1,000 invested in a home renewable energy project, Ariz. Rev. Stat. § 43-1083 (2017); (ii) a "solar energy devices" exemption from state sales tax, *id.* § 42-5061 (2017); and (iii) a prohibition on considering solar systems as an element of home value for property tax assessments. *Id.* § 42-11054 (2017). The State was similarly an early adopter of "net metering," which many states provide to compensate distributed solar generators for the excess electricity they return to the grid, offsetting their reliance on the grid at night or when their panels are not making enough energy to serve their needs. *See* Ariz. Admin. Code § R14-2-2301 (2017), et seq.; *see also* National Conference of State Legislatures, *State Net Metering Policies*, *available at* http://www.ncsl.org/research/energy/net-metering-policy-overview-and-state-legislative-updates.aspx (showing almost forty states have "net metering" programs).[5]

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[5] Ironically, in urging that its discriminatory rate-making advances legitimate objectives, SRP relies on an Arizona Corporation Commission ("Arizona Commission") decision concerning whether full retail net metering "results in a cost shift from solar customers to non-solar customers." Pet. Br. at 8 n.2. However, since that case turned on the very kind of fact-finding SolarCity seeks to challenge in this case, SRP's reference merely highlights that its state-action defense is closely tied to the specific facts of

The Arizona legislature has further sought to insure that electricity "self-generators" – such as those consumers who install rooftop solar systems – obtain the same "just and reasonable" rates as all other utility customers. Ariz. Rev. Stat. § 40-332 (2017). This policy preference furthers the legislature's overall intent for Arizona citizens to obtain "consumer protection against overreaching by" those selling electricity and other essential services. *Arizona Corp. Comm'n v. Arizona ex rel. Grant Woods*, 171 Ariz. 286, 290 (1992).

Finally, the legislature's framework for electricity restructuring, which would allow for some level of competition in the State, also runs contrary to SRP's rates challenged here, and thus further undermines SRP's claim that its challenged discriminatory rates were state-authorized. Ariz. Rev. Stat. § 30-800 (2017), et seq.; *see also Kay Elec. Coop. v. Newkirk*, 647 F.3d 1039,

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this case – which, once again, undermines SRP's claimed right to an interlocutory appeal of a purely legal issue.

In addition, the Arizona Commission decision that SRP cites recognized that the claimed "cost-shift issue would benefit from a detailed analyses of the costs and benefits of distributed generation systems," which can vary depending on numerous factors. *In re Arizona Public Service Commission's Application for Approval of Net Metering Cost Shift Solution*, File No. E-01345A-13-0248, Decision 74202 (Ariz. Corp. Comm'n 2013), at 28, *available at* http://images.edocket.azcc.gov/docketpdf/0000149849.pdf. Indeed, as a study by the U.S Department of Energy concluded, contrary to SRP's cost-shift premise, "[f]or the vast majority of states and utilities, the effects of distributed solar on retail electricity prices will likely remain negligible for the foreseeable future." Galen Barbose, Lawrence Berkeley Nat'l Lab., *Putting the Potential Rate Impacts of Distributed Solar into Context* at 29 (2017), *available at* https://emp.lbl.gov/sites/default/files/lbnl-1007060.pdf.

1045 (10th Cir. 2011) (Gorsuch, J.) (relying on electricity competition framework "on the books" to find "a policy preference for competition"). That framework also indicates that the legislature expects public power entities to treat "self-generators" (like those with rooftop solar) like any other "demand reduction" effort (such as those installing better insulation or other energy efficiency measures) – an approach also at odds with the discriminatory rates which SRP imposed on distributed solar customers alone. *See* Ariz. Rev. Stat. § 30-805 (2017) (discussing restrictions on recovering stranded costs after restructuring); *see also* J.A. at 46 (¶ 133) (alleging SRP discriminatory treatment between different electricity demand reduction efforts).

Moreover, as reflected in executive orders from several Arizona governors, the State has adopted policies supporting renewable energy, including distributed solar generation, as a tool to address the climate change crisis. Thus, in a 2010 executive order, Governor Janice Brewer declared that Arizona "strive[s] for pragmatic, pro-active approaches to climate change mitigation and adaptation by advancing clean and renewable energy, including solar power," as the State becomes "a leader in the field of solar and renewable energy." Ariz. Exec. Order No. 2010-006 (July 1, 2010), *available at* http://azmemory.azlibrary.gov/cdm/ref/collection/execorders/id/690. Indeed, the U.S. Department of Energy's National Renewable Energy Laboratory has found Arizona could obtain more than 30% of its electricity from rooftop solar systems alone – although to date it accounts for less than 2% of total

electricity generation for the State. *See* Peter Gagnon et al., Nat'l Renewable Energy Lab., *Rooftop Solar Photovoltaic Technical Potential in the U.S.: A Detailed Assessment*, at 26, Table 3 (2016), *available at* https://www.nrel.gov/docs/fy16osti/65298.pdf; U.S. Energy Info. Admin., Electric Power Monthly, Table 1.3.b and Table 1.17.b (November 2017), *available at* https://www.eia.gov/electricity/monthly/current_month/epm.pdf (comparing net generation year-to-date by November 2017 for small-scale photovoltaic ("PV") to utility-scale facilities for electric power).

Similarly, in a 2006 executive order, Governor Janet Napolitano – recognizing that a "scientific consensus has developed that increasing emissions of carbon dioxide [], methane and other greenhouse gases [] released to the atmosphere are affecting the Earth's climate" – committed Arizona to reducing greenhouse gas ("GHG") emissions pursuant to advice from the State's Climate Change Advisory Group. Ariz. Exec. Order No. 2006-13 (Sept. 7, 2006), *available at* http://azmemory.azlibrary.gov/cdm/ref/collection/execorders/id/507. The Advisory Group, in turn, recommended that Arizona pursue this goal by, *inter alia*, removing "barriers to renewable energy and clean distributed generation [] to enable more clean generation to enter Arizona's energy supply mix." Ariz. Climate Change Advisory Group, *Climate Change Action Plan* 12 (2006), *available at* http://azmemory.azlibrary.gov/cdm/ref/collection/statepubs/id/3104.

In sum, the authorization prong of the state-action defense requires a showing that the State has

"foreseen and implicitly endorsed the anticompetitive effects" of the challenged action "as consistent with its policy goals." *Phoebe Putney*, 568 U.S. at 229. Given the numerous Arizona policies promoting rooftop solar deployment as a vital component of the renewable energy transition, and the tension between those goals and SRP's rates allegedly designed to unlawfully stifle rooftop solar expansion in SRP's service territory, resolving the "authorization" prong of SRP's state-action defense is not nearly as straightforward as SRP suggests. Rather, as with the direct supervision requirement, it is closely tied with the merits of SolarCity's antitrust claims, and raises no "particular value of a high order" warranting interlocutory appeal. *Will*, 546 U.S. at 352.

II. THE FOUNDATIONAL PREMISES OF SRP'S ASSERTED RIGHT TO AN UNBOUNDED MONOPOLY DO NOT HOLD IN THE AGE OF DISTRIBUTED SOLAR COMPETITION

SRP asserts that the state-action defense protects "the need to ensure that government policymakers exercise their discretion efficiently and freely, *i.e.*, with the objective of *advancing the public interest* rather than of avoiding litigation." Pet. Br. at 35 (emphasis added). Similarly, APPA claims that the state-action defense "protects public power utilities' ability to meet their public goals" and thereby "allows states to *favor public objectives* over free-market competition." APPA Br. at 2, 4 (emphasis added). However, SRP and other public power companies are not advancing public

objectives or the public interest when they improperly target distributed solar generation.

Stifling solar energy competition through discriminatory rates – a widespread action perpetuated by SRP and numerous other power companies – harms the public interest by obstructing the tremendous benefits that distributed solar generation brings to both consumers and the environment. Such discriminatory behavior therefore contravenes the underlying purpose of the regulated monopoly, which was to protect consumers and the public interest. The state-action defense, and interlocutory appeal of adverse state-action defense rulings, should not be available as a legal bulwark for power companies like SRP to exercise unbounded monopoly power that works against the public interest in this anti-competitive manner.

A. The Premise That Electricity Monopolies Necessarily Serve The Public Interest Has Been Undermined By Public Policy And Technology

"Until relatively recently, most state energy markets were vertically integrated monopolies – *i.e.*, one entity . . . controlled electricity generation, transmission, and sale to retail consumers." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016). In the electricity industry's infancy of the early 1900s, the vertically integrated regulated monopoly made sense in light of the available technology and existent business structures of the time. Originally a natural

monopoly, the electricity sector faced extreme barriers to entry, whereby construction of power plants and grid infrastructure required massive capital investments, as well as substantial economies of scale, whereby the average cost of delivered power became cheaper with new expansion in demand. Paul Garfield & Wallace Lovejoy, *Public Utility Economics* 15-19 (1964).

The foundational premise for granting vertically integrated utilities monopoly power was to ultimately serve the public interest.[6] The electricity monopoly model sought to achieve widespread access to electricity as a public good while, at the same time, subjecting utilities to electricity rate regulation in order to prevent price gouging for ultimate consumer benefit. W.M. Warwick, U.S. Department of Energy, *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets* 2.0 (2002), *available*

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[6] Regulation, as an oversight mechanism for natural monopolies, and antitrust laws, as an oversight mechanism over competitive markets, have traditionally been viewed as binary legal approaches serving the same purpose: keeping industry in check and thereby ensuring fair consumer prices and public interest protection. Thus, as Justice Breyer has written, while antitrust laws serve to police competition in traditional competitive markets, regulation serves as "an alternative to antitrust, necessary when antitrust cannot successfully maintain a workably competitive marketplace or when such a marketplace is inadequate due to some other serious defect." Stephen Breyer, *Regulation and Its Reform* 156-57 (1982). As such, in light of increasingly disaggregated electricity services and technological innovation, legal approaches must also evolve to keep pace with the industry's ongoing development between monopolistic and competitive free market structures.

at https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-13906.pdf; *see also Smyth v. Ames*, 169 U.S. 466, 544-45 (1898) (public utility monopolies were "created for [] public purposes [and] perform[] a function of the state," and the government is obligated to "protect the people against unreasonable charges for services rendered by" the public utility).

However, the century-old premise that vertically integrated monopolies necessarily serve the public interest has been undermined by public policy and technology. In terms of policy, electricity regulators have actively encouraged competition in electricity generation in order to serve the public interest. For example, as the Court noted in *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760 (2016), the Federal Energy Regulatory Commission ("FERC") "often forgoes the cost-based rate-setting traditionally used to prevent monopolistic pricing [. . .] [and] instead undertakes to ensure 'just and reasonable' wholesale rates *by enhancing competition* – attempting . . . 'to break down regulatory and economic barriers that hinder a free market in wholesale electricity.'" *Id.* at 768 (emphasis added) (quoting *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008)).

Indeed, Congress passed a series of modern laws intended to promote competition in the electricity sector and unbundle the services of the traditional vertically integrated monopoly, all as a means to advance the public interest. Thus, due to "[t]echnological advances [that] made it possible to generate electricity

efficiently in different ways and in smaller plants" and through grids that were "unlike the local power networks of the past," *New York v. FERC*, 535 U.S. 1, 7 (2002), Congress passed both (i) the 1978 Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117, which directed FERC to promulgate rules requiring monopoly utilities to purchase electricity from independent power production facilities, and (ii) the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, authorizing FERC to order individual monopoly utilities to provide transmission services to unaffiliated wholesale generators. *See New York*, 535 U.S. at 9. In short, the assumption that the vertically integrated utility monopoly automatically serves the public interest has been undermined by public policy promoting competition in electricity services.

Distributed solar technology further subverts the economic and public interest assumptions justifying the traditional vertically integrated electricity monopoly. Distributed solar technology, with a relatively low barrier of entry, is de-centralized and can be owned or leased by consumers who are otherwise captive to the local utility monopoly. Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Electric Utility Rates and the Campaign Against Rooftop Solar*, 11 Tex. J. Oil Gas & Energy L. 211, 215 (2016). Distributed solar generation thus dispels the assumption that electricity service necessarily requires large economies of scale. John Farrell, Inst. for Local Self-Reliance, *Is Bigger Best in Renewable Energy?* 2-4 (2016), *available at*

https://ilsr.org/wp-content/uploads/2016/12/Is-Bigger-Best-in-Renewable-Energy-Report-Final.pdf. As such, distributed solar generation also fundamentally ruptures the business model of the vertically integrated monopoly, obviating the need for power companies like SRP to continuously construct infrastructure as their engine of profit generation. Peskoe, 11 Tex. J. Oil Gas & Energy L. at 228-32.

Taken together, these changes in public policy and technology, particularly distributed solar generation, undermine the assumption that electricity companies require deference to their monopoly power in order to serve the public interest.

B. Monopoly Power Companies Opposing Distributed Solar Generation Are Acting Against The Public Interest

1. Discriminatory rates against rooftop solar are widespread

Across the United States, both public and private electric utility companies have responded to competition from distributed solar generation with a range of discriminatory tactics, chief among them being the imposition of retail rate structures that serve to reduce solar power's cost advantage over grid-supplied energy. *See* Michael Wara, *Competition at the Grid Edge: Innovation and Antitrust Law in the Electricity Sector*, 25 N.Y.U. Envtl. L.J. 176, 189 (2017). In the last few years alone, these types of rate cases seeking to penalize rooftop solar customers have amounted to hundreds

and have occurred in the majority of U.S. states. *Id.* at 194-99; *see also* N.C. Clean Energy Tech. Ctr., *The 50 States of Solar Report: Q4 2017 and 2017 Annual Report* (2018), *available at* https://nccleantech.ncsu.edu/wp-content/uploads/Q4-17_SolarExecSummary_Final.pdf (documenting over 100 policy actions negatively targeting distributed generation customers in over 35 states in 2017 alone).[7]

Power utilities have imposed discriminatory retail rate structures on distributed solar customers in several forms. First, utilities have implemented either new or increased fixed monthly bill charges that are discriminatorily high for customers with distributed solar generation, known as a "fixed charge." For example, Santee Cooper, a state-owned public power utility

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[7] While the following discussion details successful attempts to impose discriminatory rates, in many other instances, both public and private power companies have been rebuffed in these efforts. *Id.* This trend not only demonstrates the widespread practice by utilities of improperly targeting distributed solar competition, but also the mixed responses by regulatory boards and commissions, thus evincing an area in regulatory flux and not warranting automatic insulation from competition.

In any event, the fact that electricity utilities have had some success in convincing regulatory boards and commissions to impose rates targeting rooftop solar generation certainly does not mean those rates are just and reasonable. Rather, given the inevitable tension between distributed solar generation and the monopoly utility model, these outcomes call into question whether the Court, in an appropriate case, should reconsider the deference afforded to state authorization for the exercise of monopoly power, and instead take into account a broader consideration of the public interest that reflects the overall consumer and environmental interests at stake. *See supra* at 24-27.

in South Carolina, imposed a fixed charge of $4.40/kW as well as further stand-by charges on distributed solar customers, regardless of the amount of energy used by the customer. *See* Santee Cooper, Distributed Generation Rider DG-17 (2015), *available at* https://www.santeecooper.com/pdfs/rates/ratesadjustment/dg-17-rider.pdf; *see also*, *e.g.*, Bd. of Dir. of Sacramento Mun. Util. Dis., Resolution No. 15-07-06 (Sacramento Mun. Util. Dist. July 16, 2015) (imposing higher fixed charges and time-of-use rates on solar customers); Kan. City Power & Light, Docket No. 15-WSEE-115-RTS (Mo. Corp. Comm'n Sep. 24, 2015) (Order Approving Stipulation and Agreement) (approving a 21% increase of fixed charges on distributed energy customers); Conn. Light & Power, Docket No. 14-05-06 (Conn. Pub. Util. Regulatory Authority Dec. 17, 2014) (Order Amending Rate Schedules) (also imposing a 20% increase of fixed charges on distributed energy customers).

Second, utility companies have imposed electricity charges on solar customers that vary as a function of the consumer's peak demand for energy, known as a "demand charge." *See*, *e.g.*, NSTAR Elec. Co., D.P.U. 17-05-B (Mass. Dept. of Pub. Util. Jan. 5, 2018) (Order Establishing Eversource's Rate Structure) (approving mandatory demand charges specifically on residential distributed solar customers).

SRP's new rate structure exemplifies both of these discriminatory rate practices, as SRP imposed both a fixed distribution charge of up to $37.88 per month and increased demand charges ranging from $30 to $125

per month for all residential distributed solar customers. J.A. 33 (¶ 108). These rate changes resulted in an increase of approximately 65% in energy fees (or $600 per year) for a typical solar customer, as opposed to a 3.9% increase in energy fees for a non-solar customer. *See* J.A. 8-9 (¶ 5); *see also, e.g.*, Wis. Electric Power Co., Docket No. 5-UR-107 (Wis. Public Service Comm'n Dec. 23, 2014) (Final Decision) (approving application to impose high demand charges, fixed charges, and time-of-use rates on distributed solar customers).

2. Discriminatory rates against rooftop solar harm consumers and the environment

Wide-scale discriminatory rates targeting solar power deployment undermine the very public objectives that power utility monopolies were created to serve because they harm both consumers and the environment.

First, rates that stifle the deployment of rooftop solar harm consumers by diminishing the economic and social value they receive through generating their own power. Due to technological advances, the cost of residential solar has dropped precipitously and is cost-comparable, if not lower, than the average price of power purchased from the utility grid. *See, e.g.*, Gideon Weissman & Brett Fanshaw, *Shining Rewards: The Value of Rooftop Solar Power for Consumers and Society* (2016), *available at* https://environmentamerica.org/sites/environment/files/reports/AME%20ShiningRewards%20Rpt%20Oct16%201.1.pdf; Mark Muro & Devashree

Saha, *Rooftop Solar: Net Metering is a Net Benefit*, Brookings Institution (May 23, 2016), *available at* https://www.brookings.edu/research/rooftop-solar-net-metering-is-a-net-benefit/. Further, distributed solar generation can serve to democratize power ownership by increasing local control over power decisions, returning economic benefits directly to the served community and promoting a more equitable distribution of economic and social benefits across racial and economic lines. *See generally* Local Clean Energy All. & Center for Social Inclusion, *Democratizing Our Energy Future* (2015), *available at* http://www.localcleanenergy.org/files/Climate%20Justice%20Energy%20Platform.pdf.

Second, discriminatory rates inhibiting distributed solar generation stave off the public health benefits associated with phasing out fossil fuel combustion from power plants. Nearly 40% of Americans are exposed to toxic air pollution from fossil fuel power plants that often reaches dangerous levels, resulting in the increased incidence of asthma and chronic bronchitis and leading to hundreds of thousands of premature deaths per year. *See* Am. Lung Ass'n, *State of the Air* 9 (2017), *available at* http://www.lung.org/assets/documents/healthy-air/state-of-the-air/state-of-the-air-2017.pdf. Critically, these public health impacts are disproportionately borne by communities of color and low-income, who more often live in closer proximity to fossil fuel power plants. *Id.* at 41; *see also* National Ass'n for the Advancement of Colored People & Clean Air Task Force, *Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil and Gas Facilities*

(2017), *available at* http://www.naacp.org/wp-content/uploads/2017/11/Fumes-Across-the-Fence-Line_NAACP_CATF.pdf. Accordingly, obstructing distributed solar generation directly exacerbates the country's systemic public health disparities by perpetuating reliance on fossil fuel power.

Finally, these discriminatory rates hinder the country's urgently needed transition to clean energy in order to combat climate change. More than 60% of America's electricity still derives from fossil fuels. U.S. Energy Info. Admin., *Electricity Explained* (May 10, 2017), *available at* https://www.eia.gov/energyexplained/index.cfm?page=electricity_in_the_united_states. As a result, the electricity sector is the single largest source of GHG emissions in the country, accounting for nearly one-third of total U.S. GHG emissions in 2015. U.S. Envtl. Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2015* ES-24 (2017), *available at* https://www.epa.gov/sites/production/files/2017-02/documents/2017_executive_summary.pdf.

Accordingly, discriminatory ratemaking against the deployment of distributed solar energy, like that implemented by SRP, undermines the inherent public interest in "aggressive and sustained greenhouse gas emission reductions" in order to avoid some of the worst impacts of climate change. Jerry Melillo et al., U.S. Global Change Research Program, *Climate Change Impacts in the United States: The Third National Climate Assessment* 13 (2014), *available at* http://s3.amazonaws.com/nca2014/low/NCA3_Climate_Change_Impacts_in_the_United%20States_LowRes.

pdf?download=1 ("2014 Climate Assessment"). Indeed, the public harms caused by climate change are immense: the increased extinction of species and ocean acidification; the rapid loss of Arctic sea ice and the collapse of Antarctic ice shelves; declining global food and water security; and the heightened frequency of heat waves and other extreme weather events, including contribution to the three unprecedented hurricanes that ravaged the Gulf Coast, Florida, and Puerto Rico in 2017. *See generally* 2014 Climate Assessment; *see also* Michael Mann et al., *What We Know About the Climate Change-Hurricane Connection*, Scientific American (Sept. 8, 2017), *available at* https://blogs.scientificamerican.com/observations/what-we-know-about-the-climate-change-hurricane-connection/.

For all these reasons, it could not be clearer that by obstructing the realization of these consumer and environmental benefits, utility rates which improperly discourage the transition to renewable energy sources like rooftop solar are contrary to the public interest.

C. Allowing Public Power Companies To Obtain Interlocutory Appeal Of State-Action Immunity Rulings Will Only Encourage More Discriminatory Rates Contrary To The Public Interest

The central premise of SRP's asserted right to interlocutory appeal is that it is necessary to allow public power entities to focus their attention on "advancing the public interest" without potential exposure to

antitrust liability. Pet. Br. at 35. However, because SRP and other utilities' decisions targeting distributed solar generation are arguably contrary to the public interest, SRP raises no "particular value of a high order" warranting immediate appeal under the collateral-order doctrine. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 605 (2009).

Instead, allowing interlocutory appeal in these circumstances will serve to further encourage power companies to unfairly obstruct distributed solar development in a manner contrary to antitrust laws, with the expectation that they can avoid liability by invoking the state-action defense and, at minimum, significantly delay antitrust litigation by immediately appealing adverse rulings. By requiring SRP to defend its rates – including its purported entitlement to the state-action defense – like any other litigant, the Court will level the playing field in an area where it has become increasingly apparent that competition, rather than the perpetuation of insulated monopoly power, will best serve the public interest.

Such a result would also be consistent with this Court's precedents recognizing that power companies are not immune from competition and antitrust laws. In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Court decisively held that the Federal Power Act does not "immunize" power companies from "antitrust regulation." *Id.* at 374-75 (permitting the federal government to seek antitrust remedies against a power utility which, among other things, refused to sell power to municipalities and transfer competitors'

power over its lines). As the Court has explained, a power company's "franchise to exist as a corporation and to function as a public utility . . . creates no right to be free of competition." *Tenn. Electric Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 139 (1939) (overruled in part on other grounds); *see also Alabama Power Co. v. Ickes*, 302 U.S. 464, 480 (1938) (holding that power utilities do not "possess" any inherent legal "right to be immune from lawful . . . competition"). These findings are grounded in the recognition that "[t]he public interest is far broader than the economic interest of a particular power supplier." *Otter Tail Power Co.*, 410 U.S. at 380 n.10. Accordingly, *Amici* urge the Court to recognize that, at least with respect to monopoly practices serving to obstruct distributed solar generation, the state-action defense and interlocutory appeal of adverse immunity rulings should be disfavored.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

HOWARD M. CRYSTAL
Counsel of Record
ANCHUN JEAN SU
CENTER FOR BIOLOGICAL DIVERSITY
1411 K Street, N.W., Suite 1300
Washington, DC 20005
(202) 849-8397
hcrystal@biologicaldiversity.org

Counsel for Amici Curiae

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